IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

	§	
	§	
IN RE:	§	
SCOTT RUSSELL DAVIDSON	§	
d/b/a	§	**CASE NO. 98-42080-BJH-11**
SCOTT DAVIDSON INTEREST	§	**Jointly Administered**
d/b/a	§	
ANTIQUE EXCHANGE and	§	
MARTHA ANN DAVIDSON,	§	
Debtors.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is a three-part motion (the "Motion") filed by Scott Russell Davidson and Martha Davidson ("the Debtors") on May 12, 2003 titled: (i) Motion to Amend Motion to Determine Value of Properties for Ad Valorem Tax Purposes (the "Amendment Issue"); (ii) Motion to Determine Whether or not Tax Liability of the Debtors May be Determined by the Court in the Event that the Debtors Did not Own 100% of the Property for Each of the Years under Consideration (the "Co-Ownership Issue"); and (iii) Motion to Determine Whether or not Debtors are entitled to any Refunds or Credit (the "Refund or Credit Issue").

First, the Debtors seek leave of Court to amend their original § 505(a) valuation motion filed in October of 1998 (the "Original Valuation Motion") for the second time. The Debtors first amended the Original Valuation Motion on June 27, 2002 by filing the Amended Motion For Valuation of Properties for Ad Valorem Tax Purpose (the "Amended Motion") (when the Original Valuation Motion, the Amended Motion, and the Motion are referenced collectively, the "Valuation Motion"). The Motion seeks to amend the Original Valuation Motion and the Amended Motion to include the post-petition, pre-confirmation tax years of 2000 and 2001 with respect to the remaining properties subject to the Valuation Motion. But, the Debtors do not seek to add more properties

(other than those identified in the Original Valuation Motion) or to reopen the evidence with respect to any properties for which value has already been determined by this Court.

With respect to the Refund or Credit Issue, the Debtors ask the Court to order the City of Arlington and Tarrant County (collectively, the "Taxing Authorities") to recalculate the taxes due on properties the Debtors sold post-petition. In the event the Debtors were overcharged by the Taxing Authorities, the Debtors ask this Court to order a refund of the overpayment or, in the alternative, to order a credit of the overpayment against any outstanding taxes owed on the remaining properties.

The Motion has been set, and reset, multiple times by agreement of the parties. On October 24, 2003, the Debtors once again noticed a hearing on the Motion for November 3, 2003. However, on November 3, 2003, the hearing was reset yet again by the parties to December 17, 2003. At that time, the Court was advised that it needed to only decide the Amendment Issue and the Refund or Credit Issue, as the Co-Ownership Issue was resolved by agreement of the parties.[1] The Court finally proceeded to hear the merits of the Motion with respect to those two issues on December 17, 2003.

The Court has core jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334 and 157(b).

Background

Scott Davidson and his mother, Martha Ann Davidson,[2] own hundreds of pieces of real property in Tarrant County, Texas that are the subject of the Original Valuation Motion. After the Debtors' bankruptcy cases were reassigned to the undersigned judge, the Court conducted a status conference with the parties at which time it was decided that the Original Valuation Motion would

[1] Thus, the Court will not address that issue in this Memorandum Opinion and Order.

[2]Also a debtor before the Court in Case No. 98-42079.

be decided in ten property increments. The Court heard the evidence with respect to the first ten properties on May 15, 2001. In the Original Valuation Motion, the Debtors sought a determination of the value of these ten properties for several years, the latest of which was 1998. However, at the May 15, 2001 trial, the Debtors sought to introduce evidence of value through 2001. The Taxing Authorities objected, and the Court ruled that it would not consider any relief beyond that specifically pled in the Original Valuation Motion due to surprise to the Taxing Authorities. Further, the Court stated that if the Debtors wanted to expand the scope of the Original Valuation Motion, they would be required to file supplemental pleadings.

At the request of the parties, the Court's decision with respect to the first ten properties was abated because the parties thought it possible that the issues raised by the Original Valuation Motion could be resolved through the plan confirmation process, rendering the Original Valuation Motion moot. Unfortunately, the Debtors ultimately proposed, and the Court confirmed on May 31, 2002, a consolidated plan[3] (the "Plan") which merely provides for payment of ad valorem taxes "to the extent that same are finally allowed and approved by the Bankruptcy Court." The Plan also provides for retention of jurisdiction by the Court for the purpose of "classification and allowance of the claim of any creditor." Thus, the confirmation process did not resolve the issues raised by the Original Valuation Motion and on June 27, 2002, the Amended Motion was filed.

Moreover, by separate motion, the Debtors sought to reopen the evidence with respect to the first ten properties tried on May 15, 2001, to include evidence of value through tax year 2001. By Order entered on September 26, 2002, the Court denied the Debtors' request to submit additional evidence of value for later years on the ground that the issue on which additional evidence was

[3] Scott Davidson and his mother, Martha Davidson, proposed a consolidated plan.

sought to be introduced was not a new issue and, if relevant at all, such issue could have been addressed in connection with the May 15, 2001 trial. In short, there was no good reason why the Debtors had not sought to include the later tax years in the Original Valuation Motion or had not sought to amend well before the May 15, 2001 trial, so that the Taxing Authorities could properly prepare to defend against such additional evidence.

Legal Analysis

Turning first to the Amendment Issue, the Debtors argue that the Court held in its Memorandum Opinion, entered on October 22, 2002, with respect to the trial of the first ten properties (the "Prior Memorandum Opinion") that it was not precluded from granting relief with respect to the post-petition tax years of 2000 and 2001 on the properties at issue in the Amended Motion. While true, for the reasons set forth below, leave to amend will be denied.

Section 505(a) of the Bankruptcy Code provides:

> (A)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to a tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

Section 505(a) has been held to grant broad jurisdiction to determine the amount or legality of a debtor's tax liability. *In re Schmidt*, 205 B.R. 394 (Bankr. E.D. Ill. 1997)(holding that the court has jurisdiction to determine the post-petition tax liabilities of the reorganized Chapter 11 debtors under § 505(a)). The purpose of § 505 is to afford a forum for ready determination of the legality or amount of tax claims in order to expedite that decision and avoid delay in the administration of the bankruptcy case. *In re Schmidt*, 205 B.R. 394, 398 (Bankr. N.D. Ill. 1997). Yet, the language of § 505(a) is clearly permissive, as it provides that a court "may" determine tax liability.

This Court has already determined that it has the ability to use § 505 to determine post-

petition tax claims in the Prior Memorandum Opinion. *See* Prior Memorandum Opinion, p. 22. The question thus becomes, should the Court grant leave to amend at this late date in order to determine the value of the Debtors' properties for tax years 2000 and 2001, such that their tax liabilities can be recalculated based on the Court's determined values?

The Debtors argue that because they first sought to include tax years 2000 and 2001 in the Amended Motion (filed on June 27, 2002), the Taxing Authorities were put on notice at that time that those post-petition tax years were in question; therefore, they cannot claim surprise. Further, the Debtors argue that Federal Rule of Civil Procedure 15(a) provides that leave to amend pleadings "shall be freely given when justice so requires."

While the Court concedes that the Taxing Authorities are probably not altogether surprised by the Debtors' request to consider tax years 2000 and 2001 – the question remains, should leave to amend be granted now? In turn, are the Taxing Authorities prejudiced by the fact that the Debtors now seek such relief from the Court, instead of using state law proscribed procedures to contest value, years after the filing of the Original Valuation Motion? Although Rule 15 "evinces a bias in favor of granting leave to amend," *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir. 1981), it is not "automatic." *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993). A decision to grant leave is within the discretion of the trial court. *Louisiana v. Litton Mortgage Co*., 50 F.3d 1298, 1302-03 (5th Cir. 1995).

In deciding whether to grant leave to amend, this Court may consider such factors as undue delay, bad faith or dilatory motive on the Debtors' part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the Taxing Authorities, and the futility of amendment. *In re Matter of Southmark Corp*., 88 F.3d 311, 314-315 (5th Cir. 1996) *citing Foman v. Davis*, 371 U.S. 178, 182 (1962); *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993);

Whitaker v. City of Houston, Texas, 963 F.2d 831, 836 (5th Cir. 1992). Although Rule 15 imposes no time limit for amendment, "[a]t some point in time delay on the part of a plaintiff can be procedurally fatal." *See* e.g., *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981); *see also Whitaker*, 963 F.2d at 836. Additionally, "[w]hile leave to amend must be freely given, that generous standard is tempered by the necessary power of a district court to manage a case." *Shivangi v. Dean Witter Reynolds. Inc*., 825 F.2d 885, 891 (5th Cir. 1987); *see also Boyd v. United States*, 861 F.2d 106, 108 (5th Cir. 1988).

As relevant here, the Court is troubled by the unreasonable delay in this matter by the Debtors and the likely prejudice to the Taxing Authorities. The Motion was not filed a few months late, or even a year late, but was filed nearly four years after the filing of the Original Valuation Motion. But, at the December 17, 2003 hearing when probed for an explanation as to this lengthy delay, the Debtors' counsel was unable to provide a credible explanation or produce evidence to substantiate such an explanation.

In fact, it has not been either the Debtors or the Taxing Authorities that has been pushing to resolve these issues. The Court appears to be the party most interested in bringing the Debtors' bankruptcy cases to a close. When the Debtors' cases were reassigned to the undersigned judge in March, 2000, the Debtors and the Taxing Authorities had reached an agreement upon the appropriate treatment of the tax claims in a plan of reorganization and they announced their intention to present an agreed confirmation order to the Court in late 1999. Yet, the Debtors failed to submit the agreed confirmation order.[4]

In connection with the Amendment Issue, the Debtors must show that they have not acted

[4] While now expressing great frustration with the Debtors' failure to submit the agreed confirmation order, the Taxing Authorities failed to object to that failure until well after the cases were reassigned to the undersigned. It thus appears that the Taxing Authorities have not been particularly diligent either.

with undue delay. They have failed to carry that burden here.

Moreover, the Taxing Authorities insist that the Debtors' post-petition taxes should have been protested via the Tarrant Appraisal District ("TAD") administrative review process. Further, the Taxing Authorities argue that the Debtors were fully aware of the procedure to contest the properties' value post-petition. Scott Davidson testified in support of the Motion at the December 17, 2003 hearing and stated that he had protested TAD's property values for tax year 2000 with respect to some (approximately forty - fifty), but not all, of his properties, and that he had protested some, but not all, of the appraised values on his properties for tax year 2001.[5] Yet, he was unable to identify the properties he protested, and did not introduce any documentary evidence to support his testimony. According to the Taxing Authorities, the Debtors now want to bypass the relevant state procedures and obtain relief from this Court for the post-petition tax years 2000 and 2001 with respect to all of the properties.

The Taxing Authorities contend that they have been irreparably harmed by the Debtors' failure to comply with state law in protesting the properties' value in several respects. First, they argue that they have been left at a distinct disadvantage because TAD now takes the position that it has no obligation to participate in defending its values since the Debtors allowed the tax values to become final under state law by not originally protesting the values through the proscribed procedures. Tex. Tax Code Ann. § 1.15 (Vernon 2002); *see* Prior Memorandum Opinion, pp. 11-13. The Taxing Authorities now claim that they are without valuation experts, as they cannot commission TAD to defend its values, and they are not authorized by state law to hire independent appraisers. *Id.* Thus, the Taxing Authorities contend that if the Debtors had timely contested the

[5] *See* Electronic recording of the hearing on December 17, 2003 (hereinafter the "Electronic Record") at Tape 1, Side B.

values for tax years 2000 and 2001, a resolution would have been reached via a simple, state law administrative mechanism. Alternatively, according to the Taxing Authorities, if the Amendment Issue had been raised and litigated in this Court before the tax values became final under state law, TAD could have been compelled to participate in hearings here. Now, because of the Debtors' delay in proceeding on the Motion, the Taxing Authorities are without TAD's assistance or the ability to hire an outside expert witness.

The Court agrees with the Taxing Authorities' ultimate conclusion. There has been an unreasonably delay by the Debtors in the prosecution of these cases generally, and in the prosecution of the Valuation Motion specifically, for reasons that have not been explained to the Court's satisfaction. If the Debtors were sincere in their desire to have this Court determine the value of the properties for tax years 2000 and 2001, the issue should have been raised and litigated years ago. The Debtors' unreasonable delay has unfairly prejudiced the Taxing Authorities and leave to amend will be denied.

Turning to the Refund or Credit Issue, the Debtors ask this Court to determine that they are entitled to a refund for overpayments they may have made to the Taxing Authorities on properties sold post-petition. Alternatively, the Debtors ask this Court to determine that they are entitled to credit any such overpayments on properties sold post-petition against the tax liabilities on other properties.

The Court concludes that it may not grant the requested relief, as it lacks jurisdiction to do so. The Court's jurisdiction under § 505(a)(1) of the Bankruptcy Code is limited by § 505(a)(2)(B). As stated by the Fifth Circuit in *In re Luongo*, 259 F.3d 323, 329 n. 4 (5th Cir. 2001) "§ 505(a)(2)(B), like § 505(a)(2)(A), limits the jurisdictional grant in § 505(a)(1). Section 505(a)(1) grants the bankruptcy court jurisdiction over any tax claim including refund claims; § 505(a)(2)(B) then

prescribes the limits particular to the bankruptcy court's ability to determine a refund."

Section 505(a)(2)(B) provides:

> (2) The court may not so determine-
> * * *
> (B) any right of the estate to a tax refund, before the earlier of-
> (i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund has claimed; or
> (ii) a determination by such governmental unit of such request.

The purpose of § 505(a)(2)(B) is to afford the taxing authority a reasonable opportunity to review any refund claim under its normal administrative procedures. *In re Maley*, 152 B.R. 789, 793 (Bankr. W.D.N.Y. 1992). The 120-day time frame was thought to be a reasonable period of time to strike an appropriate balance between the needs of the taxing authorities and the need to promptly administer the bankruptcy estate. *Id*.

Here, the Debtors failed to comply with the requirements of § 505(a)(2)(B) in that they did not request a refund from the Taxing Authorities in accordance with the Texas state law procedures. Those procedures were described in the Prior Memorandum Opinion. *See* Prior Memorandum Opinion, pp. 12-13. Because the Debtors failed to request a refund from the Taxing Authorities, and the time period for filing a petition for review with the state district court has long passed (essentially an appeal of TAD's final determination of value, although the issue of value is tried de novo and the prior action by the appraisal review board is not admissible), this Court is without jurisdiction to hear the Debtors' request for a refund.

However, on this record, even if this Court had jurisdiction, the Court would decline to exercise it. According to Scott Davidson, his awareness of any alleged overpayments came as a result of information he (or the title company) received from the Taxing Authorities. In the past,

the Taxing Authorities gave him a statement of ad valorem taxes owed on specific properties, and he in turn relied on that statement when making tax payments on the property – arguably a procedure he employed most often in connection with a sale payoff. Specifically, Scott Davidson testified that on one occasion he went to the tax office with a tax statement he had previously received to make a payment, and once he told the clerk he was in bankruptcy, he was presented with a different statement containing lower tax figures than he had previously been provided. He testified that he noticed an approximately $2,000 tax difference in the revised statements he was given on properties located at 6307 Mercedes Street and 3300 West Division Street in Arlington. Yet, while this incident disturbed the Debtors, it did not prompt them to take further action to determine if they had made any overpayments on any other property.

The Debtors simply assume other tax statements were similarly overstated. From this assumed premise, the Debtors argue that they should not be punished for the Taxing Authorities' own alleged internal miscalculations. According to the Debtors, to do so would unjustly enrich the Taxing Authorities. Thus, the Debtors seek an adjustment for clerical errors they assume the Taxing Authorities have made.

The Taxing Authorities oppose this requested relief for several reasons. First, they contend that the Debtors have been knowingly paying out property taxes since the beginning of these cases without consulting the Taxing Authorities. The Taxing Authorities also argue that a request for a refund is untimely under state law, pointing to the Prior Memorandum Opinion for support. The Taxing Authorities finally contend that early in the cases they offered an alternative arrangement pursuant to which the Debtors could escrow the disputed amount of taxes owed in connection with a sale pending resolution of any dispute over amounts owed. Thus, with respect to any payment already made, the Taxing Authorities conclude that those payments were made in accord and

satisfaction of the amounts in controversy and deny that any refund or adjustment may now be had by the Debtors.

The record is clear that neither the Debtors, nor their counsel, took any steps to calculate, or to prepare to calculate any possible overpayment of taxes on any of the properties in question. While the Debtors suspect that they have made overpayments to the Taxing Authorities, Scott Davidson admits that he is not sure if he has been overcharged on more than the two properties he testified about, as he has made no effort to do the required calculation himself because he "really d[id]n't want to have to."[6] The Debtors never obtained the necessary information, from the Taxing Authorities or otherwise, so that they could do the calculations themselves. They never contacted any of the Taxing Authorities involved to ask for their assistance in making the required calculations with respect to the properties. Finally, the Debtors did not petition the Court to seek to employ a tax consultant in preparation for the evidentiary hearing on the Motion. Instead, the Debtors want this Court to order the Taxing Authorities to recalculate all of the taxes with respect to the properties in question to make sure that the Debtors have not been overcharged, and if they have been so overcharged, to order a refund or a credit against future tax liability. The Court declines to do so.

Finally, with respect to the Debtors' request to credit any tax overpayments against future tax liabilities, this Court's prior determination of this legal issue against the Debtors is the law of the case. *Copeland v. Merrill Lynch & Co., Inc.,* 47 F.3d 1415, 1423-1424 (5th Cir. 1995)(stating that the law of the case doctrine provides that once a court of competent jurisdiction decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case); *Matter of England*, 153 F.3d 232, 235 (5th Cir.1998)(determining that the law of the

[6] *See* Electronic Record at Tape 1, Side B.

case doctrine encompasses those decisions decided by necessary implication as well as those decided explicitly). In its Prior Memorandum Opinion, this Court held that the Debtors were time-barred from requesting a credit pursuant to a § 505 review as they were time-barred from filing an appeal of TAD's final determination of value under Texas state law – *i.e.*, the petition for review with the state district court described above. *See supra* at pp. 9-10; *see also* Prior Memorandum Opinion, pp. 22-23.

Conclusion

There is no evidence in the record to support granting leave to amend. An amendment at this point would only serve to further delay the process and prejudice the Taxing Authorities. Further, based on the testimony, the Court finds that at least one of the Debtors began to contest tax values for years 2000 and 2001 before TAD, but became frustrated when he found the valuations given by the panel arbitrary, the preparation process void of guidelines, and the evaluation procedure laborious and confusing. But, all property owners in Tarrant County are required to follow these state law procedures. While the pendency of the Debtors' bankruptcy cases provides the potential for some relief to be afforded to them, that relief was not timely requested and their delay in making the request has prejudiced the Taxing Authorities' ability to defend themselves with respect to the valuation issue for tax years 2000 and 2001.

Moreover, there is no legal basis upon which the Court can order a refund or credit for taxes that may have been overpaid by the Debtors. Again, the Debtors' failure to proceed on a timely basis has resulted in relief being unavailable. Therefore, it is

ORDERED that, with respect to the Amendment Issue and the Refund or Credit Issue, the Motion is denied.

Signed this 22nd day of March, 2004.

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Barbara J. Houser
United States Bankruptcy Judge